Supreme Court, U.S.
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84-235

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1984

SHOWCASE CINEMAS CONCESSIONS OF DEDHAM, INC., ET AL.,
PETITIONERS,

v.

JOHN SILVA, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

Questions Presented

1. Whether the Court of Appeals violated the right to freedom of speech guaranteed to the petitioners under the First Amendment to the United States Constitution by imposing liability on them based upon the content of speech contained in a movie exhibited by petitioners.

2. Whether reliance upon facts not contained in the record and a failure to follow its own precedent by the Court of Appeals in upholding the judgment of the District Court denied the petitioners the due process of law guaranteed under the Fifth Amendment to the United States Constitution.

3. Whether the District Court is required affirmatively to exercise its discretion by setting forth findings and reasons for its denial of a motion for a new trial under Rule 59 of the Federal Rules of Civil Procedure, based upon the sufficiency or weight of the evidence.

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners Showcase Cinemas Concessions of Dedham, Inc. and National Amusements, Inc.[1] respectfully pray that a writ of certiorari issue to review the Judgment and Decision of the United States Court of Appeals for the First Circuit entered herein on June 14, 1984.

[1] By agreement of the parties during the course of trial, the action was tried only against defendant National Amusements, Inc.

Opinions Below

The Opinion of the Court of Appeals (Appendix A, *infra*, p. A-1) is not yet reported. No formal opinion was rendered by the District Court. However, relevant rulings are set forth herein (Appendix B, *infra*, p. A-7).

Jurisdiction

The Judgment of the Court of Appeals was entered on June 14, 1984 (Appendix A, *infra*, p. A-6). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional Provisions and Rules of Civil Procedure Involved

The Provisions of the First and Fifth Amendments to the United States Constitution and Rules 50 and 59 of the Federal Rules of Civil Procedure are set forth in Appendix C, *infra*, p. A-21).

Statement

This petition for a writ of certiorari is filed on behalf of the Defendants below, whose motions for directed verdict, motion for judgment notwithstanding the verdict and motion for a new trial were denied by the District Court and whose appeal from the judgment entered after the denials was denied by the Court of Appeals. While the course of the proceedings may appear mundane in comparision to matters considered by this Court, the actions of the District Court and the Court of Appeals were so egregious as to rise to the level of constitutional deprivations and to provide this Court with a vehicle for establishing appropriate guidelines for District Courts and Courts of Appeal respectively in ruling on trial motions and reviewing the rulings on appeal.

Petitioner National Amusements, Inc. is the operator of a theater complex in Seekonk, Massachusetts. On December 25, 1979, Respondents' decedent, John Silva, Jr., together with his brother and two friends attended a movie which was being shown in one of six movie theaters located in the complex. The movie "Quadrophenia" was a rock musical which depicted violence between two youth groups in England. The movie, as of the date of the occurrence at issue, had been playing for five days without incident among patrons. Also in attendance at the same showing on December 25 was another group of four youths who were loud and boisterous during the showing of the film. During the course of the film, some words were exchanged between the two groups although none of the language was characterized as a threat. No weapons were observed. Although no ushers or theater employees were seen in the theater during the course of the movie by any of the patrons who testified, none testified that he looked for or sought an usher. The theater manager testified, without contradiction, that he personally entered the theater at least twice during the course of the movie, on a routine basis and that he observed ushers enter the theater on routine checks. There was absolutely no evidence of actual notice to the theater of an impending assault.

At the end of the movie, both groups exited the theater through a door near the screen which opened to the parking lot. In a sudden attack, just outside the door, John Silva, Jr. was stabbed to death by one of the youths in the other group. There was no usher stationed at the doorway, nor had there ever been in the more than four years that the theater complex had been operating. While there was evidence of property crimes having been previously committed in the parking lot, two instances of crimes against the person of theater employees and one abduction of a person from the theater parking lot during the attempted apprehension of a suspected auto thief, there was no evidence of any crime ever having been com-

mitted at a theater exit nor of any crime having been committed against the person of any of the 3,411,655 theater patrons from the date of the opening of the theater through December 25, 1979.

After presentation of plaintiffs' evidence at trial, Petitioner moved for a directed verdict which was denied on the basis that the stabbing was foreseeable as a consequence of the past criminal activity and the behavior of the rowdy group during the movie (ruling of trial judge at Appendix B, *infra*, p. A-7). At the close of all of the evidence Petitioner again moved for a directed verdict which was denied for the reasons previously stated. Within the required time, Petitioner filed a "Motion for Judgment Notwithstanding the Verdict, and, in the Alternative, for a New Trial," accompanied by a supporting memorandum. No hearing was held. District Court ruled on the motion by merely typing the word "Denied" in the margin.

The Court of Appeals upheld the District Court's denial of the directed verdict on the basis that "...the jury could find from the film, the audience and the circumstances that violence was in the air, that the theater did not take reasonable steps to prevent it, and that this failure foreseeably led to tragedy." The denial of the new trial motion was upheld on the basis that the record was clear that it was denied for the same reason as the directed verdict motion.

Petitioner filed a petition for rehearing before the Court of Appeals, noting that the Court had, in its opinion, ignored its own precedent by failing to consider uncontradicted evidence, relied on "facts" and inferences not contained in or supported by the evidence and imposed liability upon Petitioner premised on a conclusion arrived at by speculation and conjecture (Appendix D, *infra*, p. A-25). Rehearing was denied, as was a motion for stay of the Court's mandate.

Reasons for Granting the Writ

Consideration for granting of the writ must begin from the statement of the Court of Appeals in considering Petitioners' arguments that "...the question is a very close one...." It is respectfully submitted that given that premise, consideration of the judicial mistreatment of Petitioners by the Courts below should be given by this Court in order to rectify injustices which rise to constitutional levels and, thereby, establish as rules for all inferior federal courts appropriate procedures for considering legal issues raised in good faith by litigants.

1. It is well settled that the exhibition of motion pictures is protected by the free speech guaranty of the First Amendment. *Kingsley International Pictures Corp.* v. *Regents of the University of the State of New York*, 360 U.S. 684 (1954). Yet, in the present action, the Court of Appeals found that "the film" which it had described as "...depicting violence between British Mods and Rockers" was a factor from which liability could be imposed on Petitioners. In essence, liability was imposed on Petitioners for the content of protected speech. There is no assertion or intimation that the content of the movie rose to a level of criminal incitement which might justify punitive action or restraining, *Kingsley International Pictures Corp.* v. *Regents, etc.*, 360 U.S. at 689. It must be noted that no First Amendment issue was raised before the Court of Appeals, since the District Court did not consider the protected conduct as a basis for its rulings. This Court should declare that the exercise of a constitutionally protected right cannot serve as a premise for the imposition of monetary damages by way of civil liability.

2. The standards applicable to the District Court initially ruling on a motion for a directed verdict and a motion for judgment notwithstanding the verdict and the Court of Appeals in reviewing such rulings are well settled.

> The standard of review that applies to a refusal to direct a verdict in favor of a defendant is well established. A verdict should be directed only where the evidence could lead reasonable men to but one conclusion. This determination is to be made without evaluating the credibility of the witness or considering the weight of the evidence. . . . The same review standard applied to a refusal to grant a motion for judgment n.o.v. The evidence and any reasonable inferences therefrom are to be reviewed in the light most favorable to the nonmoving party. . . . *deMars* v. *Equitable Life Assurance Society of the U.S.*, 610 F.2d 55, 57 (1st Cir. 1979).

The appellate and trial court standards are the same, *Harrington* v. *United States*, 504 F.2d 1306, 1312 (1st Cir. 1974). However, the court must consider uncontradicted evidence introduced by the moving party, *Allen Pen Co.* v. *Springfield Photo Mount Co.*, 653 F.2d 17, 19 (1st Cir. 1981), and "A plaintiff is not entitled to unreasonable inferences which rest on speculation and conjecture." *Carlson* v. *American Safety Equipment Corp.*, 528 F.2d 384, 385 (1st Cir. 1976). An examination of the record and Petition for Rehearing before the Court of Appeals (Appendix D, *infra*, p. A-25) overwhelmingly demonstrates that the Court of Appeals violated each element of its own standard by relying upon evidence not in the record (supposedly gestures by raucous groups where no such evidence appears) ignoring uncontradicted evidence (that the manager, on at least two occasions and ushers were present in the movie theater) and arriving at a conclusion based upon pure speculation and conjecture (that assault was foreseeable).

It is submitted that the failure of the Court of Appeals to follow its own precedents amounts to a denial of due process rights which our society mandates for the protection of all litigants. This Court of Appeals did much more than ignore the doctrine of stare decisis. This Court of Appeals in its opinion made a mockery of the orderly due process so essential

to the maintenance of the free society established by our Constitution. This Court of Appeals had the audacity to write facts into its opinion which did not appear anywhere in the record. No litigant should be forced to accept such action. It is not the function of any court to justify its opinion by the use of facts not in the record. One can appreciate the heavy burden experienced in the court system created by the great numbers of cases to be decided. If the time ever comes in this country where sheer caseload grants a license for a court to deprive a litigant of inalienable Constitutional rights then our civilization will collapse. The context of the instant case demonstrates most clearly the wisdom of the due process clause of our Constitution. Admittedly a negligence case would not ordinarily deserve consideration by the highest Court in this land. Avowedly, these Petitioners assert that the deprivation of their Constitutional due process rights was so exceptional that they must be recognized, and they plead for a remedy which only can be considered by this Court.

3. The treatment by the District Court and the Court of Appeals of the motion for a new trial is an absolute disregard of the rights of these petitioners. Counsel filed the motion and a supporting memorandum in the District Court. The Court held no hearing, made no findings, and offered no reason for its denial (Appendix B, *infra*, p. A-20). On review, the Court of Appeals stated: "The record makes clear that [the trial court] denied a new trial for precisely the same reasons that it denied the directed verdict." (Appendix A, *infra*, p. A-4). How could it tell? Further, the obligation of the trial judge in ruling on a new trial motion is different from his obligation on a directed verdict motion.

> A motion for a directed verdict or for judgment n.o.v. raises the legal sufficiency of the evidence, and is to be sharply distinguished from a motion for a new trial on the ground that the verdict is against the weight of the evidence. The latter motion is addressed to the sound

> discretion of the trial court, which may set aside the verdict as contrary to the preponderance of evidence, although a directed verdict or judgment n.o.v. is not justified. 6A *Moore's Federal Practice* ¶59.08[5], pp. 59-141 - 59-143 (2nd ed. 1983) (footnotes omitted).

The Court of Appeals could not review the record for an abuse of discretion where the record shows that no meaningful discretion was exercised by the trial judge. *See*, 6A *Moore's Federal Practice*, supra, at ¶59.08[5], pp. 59-140. With respect to the consideration of the new trial motion, the Court of Appeals has compounded the denial of Petitioners' rights.

It is respectfully submitted that this Court may use this case for a vehicle for setting forth specific guidelines to be followed by a trial judge in ruling on a Rule 59 motion for new trial based upon a verdict against the weight of the evidence. At a minimum, some specific findings should be required to be placed on the record in order to assure a right to meaningful review.

Conclusion

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 83-1924

JOHN SILVA, ET AL.,

PLAINTIFFS, APPELLEES,

v.

SHOWCASE CINEMAS CONCESSIONS
OF DEDHAM, INC.,
NATIONAL AMUSEMENTS, INC.,

DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[HON. RAYMOND J. PETTINE, *Senior U.S. District Judge*]

Before
COFFIN, BOWNES AND BREYER,
Circuit Judges.

Edward W. Moses, with whom *Harry W. Asquith*, and *Asquith, Merolla, Anderson, Ryan & Wiley* were on brief, for appellant.
Raymond A. LaFazia, with whom *Gunning, LaFazia & Gnys, Inc.*, and *John D. Lynch* were on brief, for appellees.

June 14, 1984

BREYER, *Circuit Judge.* The defendant in this diversity case, a movie theater, appeals a jury award of damages to the plaintiffs for the wrongful death of their son, John Silva, Jr. Essentially, the jury found that the theater had breached its duty to Silva, "a paying patron[,] to use reasonable care to prevent injury to him by third persons whether their acts were accidental, negligent, or intentional." *Rawson* v.

Massachusetts Operating Co., 328 Mass. 558, 558, 105 N.E.2d 220, 220 (1952); *Restatement (Second) of Torts* § 344 & comment f (1965) (proprietor may have duty to police premises and thus afford reasonable protection). The parties agree that the law of Massachusetts (the place of injury) governs. The defendant theater argues that, under Massachusetts law, the evidence does not support the verdict, particularly in respect to the causal connection between negligence and injury or the foreseeability of the attack.

Viewing the evidence, as we must, in the light most favorable to plaintiffs, *deMars* v. *Equitable Life Assurance Society of the United States*, 610 F.2d 55, 57 (1st Cir. 1979), the jury could have found the following key facts among others. On Christmas Day, 1979, Silva went to the Showcase Cinema with his brother and two friends to see "Quadrophenia," a film depicting violence between British Mods and Rockers. In the theater they were disturbed by three men and a woman, dressed in somewhat tattered clothing, sitting nearby, singing, yelling, and banging on the seats. Silva's group, along with other patrons, asked the raucous group to keep quiet. The group responded with words, gestures, and profanity. Some patrons moved away, annoyed by the noise and by vomit on one of the seats. Silva and his friends remained. The boisterous behavior continued throughout the film, but no usher or other theater employee intervened or, indeed, even appeared inside the auditorium. After the film, one of the troublemakers gestured at Silva's group. Both groups went out through a door behind the screen into the theater's parking lot just in back, at which point one of the three men stabbed and killed Silva. The jury could also have found that the theater (including the parking lot) had been the scene of numerous past acts of vandalism, theft, a kidnapping, and even an incident in the theater lobby in which a patron held a knife to the theater manager's throat. The theater typically used ushers to control boisterous behavior; it hired security guards when

needed to stop potential rowdiness; and it had several traffic policemen stationed in front of the theater on the night in question.

The facts of this case bear a striking resemblance to those of *Rawson* v. *Massachusetts Operating Co., supra.* In *Rawson*, a group of theater patrons acted in a boisterous, rowdy manner throughout the show. An usher appeared only once to look at the group for a few seconds and to quiet them momentarily. Another patron said to one of the rowdies, "Why don't you go home with the rest of them and let us enjoy the picture?," at which point the rowdy hit him in the face. In allowing recovery against the theater, the Supreme Judicial Court stated that the jury could have found that the defendant theater

> was remiss during one hour and one half in failing to discover and stop the disorder; that the defendant should have known that if it did not take such action, it was to be reasonably anticipated that patrons might undertake to supply the omission; and if that happened, the authors of the rowdyism might resent such unofficial interference with their misbehavior, and might even commit a cowardly assault in the dark upon a remonstrating patron.

Id. at 560, 105 N.E.2d at 221.

Although the question is a very close one, we, like the *Rawson* court, conclude that a jury could reasonably have believed that an attack was foreseeable if the auditorium was not adequately patrolled and that, had there been a show of authority, the parking lot attack would not have taken place. The jury could have reasoned that the show of authority itself would have cowed the troublemaking group; or it might have believed that an usher keeping an eye on the group as it left, ready to call for help to the policemen in front of the theater, would have made the difference. We are not prepared to say that a jury would be unreasonable in either belief.

The cases appellant cites (with one exception) are from jurisdictions other than Massachusetts, and in any event, their

fact patterns are distinguishable. *See Twin City Amusement Co.* v. *Salater*, 237 Ark. 206, 372 S.W.2d 224, 226 (1963) ("Nothing in the evidence suggests . . . that more servants could have prevented the affray . . . ."); *Ellis* v. *Safeway Stores, Inc.*, 410 A.2d 1381 (D.C. 1979) (attack in supermarket not foreseeable); *Taylor* v. *Hocker*, 101 Ill. App. 3d 639, 428 N.E.2d 662 (1981) (property crimes did not make parking lot assault foreseeable); *Hawkins* v. *Maine & New Hampshire Theaters Co.*, 132 Me. 1, 164 A. 628 (1933) (injury caused by child shooting BB's at balloons in theater not foreseeable); *Hart* v. *Hercules Theatre Corp.*, 258 A.D. 537, 17 N.Y.S.2d 441 (attack in ladies room not foreseeable and not reasonable consequence of absence of matron there or of usher in hall), *leave to appeal denied*, 283 N.Y. 777, 19 N.Y.S.2d 771 (1940); *Gustaveson* v. *Gregg*, 665 P.2d 693 (Utah 1982) (known animosity between two bowling leagues did not make assault foreseeable).

Goggin v. *New State Ballroom*, 355 Mass. 718, 247 N.E.2d 350 (1969), the one Massachusetts case cited by appellant, involves couples bumping in a dance hall and resembles neither *Rawson* nor the present case. Here, as the parties agree, the theater owner had a duty to take reasonable steps to forestall reasonably foreseeable harm flowing from even the intentional acts of its patrons. Here, the jury could find from the film, the audience, and the circumstances that violence was in the air, that the theater did not take reasonable steps to prevent it, and that this failure foreseeably led to tragedy. Consequently, the trial court acted within its lawful powers in denying the directed verdict and judgment n.o.v. for defendant. The record makes clear that it denied a new trial for precisely the same reasons that it denied the directed verdict. And the record adequately supports that denial. *Valm* v. *Hercules Fish Products, Inc.*, 701 F.2d 235, 237 (1st Cir. 1983) (new trial warranted only when "the jury's verdict was so clearly against the weight of the evidence as to constitute a manifest miscarriage of justice.") (quoting *Hubbard* v. *Faros Fisheries, Inc.*, 626 F.2d 196, 200 (1st Cir. 1980)).

Finally, appellant claims that the district judge ought to have allowed it to introduce evidence that Silva's assailant was convicted of manslaughter. The judge gave several reasons for refusing to admit the evidence:

> One, it is certainly not relevant whether the man was convicted or not convicted. Two, the plaintiffs are willing to stipulate it was a criminal act. Three, [defendant's counsel] says all he wants it for is to establish it was a criminal act. Four, that means he has accomplished his purpose. Five, there is no need for the conviction. Therefore, I sustain the objection.

Appellant argues that the fact of conviction would have shown an *intentional* act, which, it believes, would be less foreseeable. But nothing in the record suggests that the stabbing was accidental; and the stipulation that the act was criminal should have made defendant's point. The balance of probative value and potential prejudice under Fed. R. Evid. 403 is one to be struck by the district court, *Stanlewicz* v. *Beecham, Inc.*, 687 F.2d 526, 530 (1st Cir. 1982); *United States* v. *Barletta*, 652 F.2d 218, 220 (1st Cir. 1981), and here that court acted well within its powers.

The judgment of the district court is

Affirmed.

United States Court of Appeals
For the First Circuit

No. 83-1924

JOHN SILVA, ET AL.,
PLAINTIFFS, APPELLEES,

v.

SHOWCASE CINEMAS CONCESSIONS
OF DEDHAM, INC., ET AL.,
DEFENDANTS, APPELLANTS.

JUDGMENT
Entered: June 14, 1984

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
FRANCIS P. SCIGLIANO
Clerk.

[cc: Messrs: Moses and LaFazia]

APPENDIX B

[101] [Mr. LaFazia]. . .Particularly as to whether or not any usher was on duty. We put the answers to interrogatories in. And insofar as the record appears here, no ushers went into that theatre at any time except that there's a record of a temperature check by an usher named Drapeau at some time that night. We're not even certain if it was during this particular, particular showing. We've got evidence in here that there was vomit in the theatre. And I submit that any jury could reasonably infer that if there's vomit in the seats where paying customers are going, that that theatre is not performing a function which they say they perform in their answers to interrogatories. This would show an utter disregard for the safety of the audience. I think the jury could infer that. These are questions for the jury and I submit that if there was some security there this jury has a right to conclude that more probably than not, this would not have happened if there was some security there, it would have been a deterrent to it and more probably than not this would not have happened.

I say there are questions of fact for this jury and I ask that the motion be denied.

THE COURT: Well, all right, let me try to give an analysis of this problem that is before the court. And I'm going to try to give it as objectively as I know how and then tell you my conclusions, and why I give them. To begin [102] with, what do we have to do when we have a motion for a directed verdict? And by that what do we have to do, I mean what does the court have to do? Well, it must draw against the party making the motion all inferences most favorable to the party opposing the motion. And it's only proper where the evidence is without dispute or is so conclusive that if the verdict were returned for the party against whom the motion is directed, exercise of judicial discretion would require that it be set aside. Now the general ruling has been couched in various ways but it all means the same thing, it all boils down to the same thing.

I have to decide whether there's evidence in this case which justifies submitting the issue to the jury. And I should indeed, I am required not to deny a motion for a directed verdict where the evidence is such that reasonable men might reach different conclusions. Now, there are a number and a legion of cases which support that kind of law. I have some older cases here, but if you want the citations, and I don't know why you would because there's so many of them, but there's *Witchovia Bank and Trust Company* versus *United States*, 288 Federal Second, 7050, *Farmer's State Park of Valparaiso* versus *Dravo Corporation*, in 321 Fed. 2nd, page 38. Any number of other cases from the various jurisdictions all in the same vein, all holding the same thing.

What do we have here? I'm not going to reiterate the [103] testimony we're all very familiar with it. So let's go to some of the cases at hand that try to tell us the standards we should apply in deciding the question of liability. Many of these you gentlemen have cited in your briefs, and I have looked them up and I have read them. And I think that some of them are not in point at all and others are very much in point.

The case—one of the cases cited in defendant's memorandum *LaBoisier* versus *Raparot* 101 Rhode Island 565, 225 Atlantic Second 666. I respectfully submit Mr. Asquith, that does not support the proposition for which it was cited. It's nothing other than a negligence case. And the discussion holds that—is whether or not that the release of negligent servant releases the master. That's not what we're here for and that's not an issue that's involved here. Another case cited was *Benton* versus *James Hill Manufacturing*, 26 Rhode Island 58 — no, 192 58 Atlantic 664. I can't help but note that that case is 1904. That's even before I was born and that's going back a long time. Now, it says here, the plaintiff child was looking in a factory window and she was annoying the workers and one of the workers threw a piece of iron at the plaintiff which injured her. And they held that the assault was not committed with the authority for the master. The plaintiff was a

trespasser, so the defendant company had no duty to [104] trespasser for tort which was outside the servant's scope of employment.

Then we come to the case which is more in point which Mr. Asquith did stress in his argument and it's one that the court has to give consideration to which is *Rawson* versus *Massachusetts Operating Company* at 328 Massachusetts, 558. 105 New England Second, 220, which is a 1952 case. Now, that contains certain quoted language which is pertinent and it cites to the first Restatement of Torts, Section 348. And in that case, the Massachusetts Supreme Judicial Court held that a theatre owner was liable for assault on a plaintiff by a rowdy boy. That the plaintiff had been asked to be quiet and that case perhaps can be distinguished from this in that that took place inside the theatre and this act had taken place outside the theatre. And Mr. Asquith argues that at least there, there was notice and the usher had gone down to the boy and had asked him to be quiet, or things to that effect. Well, of course, there's—that's not a facetious argument. It's the best argument that the defendants could have made and it's the best support they have for the situation here. And I'll come back to that.

Then we had Gogin versus *The New State Ballroom*, 355 Massachusetts 718, also at 247 New England Second 350, which seems to support the defendant's proposition, but with that case I think we have to look to the facts, because I think [105] the facts in that case are important. And I think the language in that case that the plaintiffs could use to their advantage. There Gogin plaintiff and his girlfriend went to a ballroom on a holiday and people were acting rowdy. Now, the plaintiff it appears, was very familiar with the ballroom. He was familiar with the music that was playing; he had worked there. In fact, he used to work there every Saturday night and evenings for the whole preceeding year. And on the night in question although he was a paying patron, this incident happened. It seems that at the time there were about eighteen

hundred to nineteen hundred people on a ninety by a hundred and twenty-five foot dance floor. And they got bumped and they got knocked down. Now, it may have been accidental or it may have been on purpose. But at any rate, they brought suit. That case was in 1969. In '69 the hot item was cha-cha music, not rock or hard rock, or soft rock. But at any rate, there is some interesting language there. I'd like to go over that language of the case with you. There the court said, "The law in these circumstances has been often stated, the defendant which opened his ballroom to the public in furtherance of its business, owed the duty to the plaintiff who paid to enter of reasonable care. That no injury occurred to the plaintiff through the actions of a third person, whether such acts were accidental, negligent, or intentional." Then there's [106] some other quoted language, "Its liability in this instance must arise from its knowledge or the facts and..." Here it is, "...it should have known of or anticipated in the exercise of reasonable care the disorderly or rowdy actions of third persons which might lead, 'which might lead,' to injury of the plaintiff." Now, I think that is a very, very potent statement from the court. Now, an analogy can from that statement be drawn to this case at hand. Knowledge of facts it should have known. Now, certainly in all God-given common sense, any manager who is worth his salt should have known what was going on in the parking lot of this theatre. Should have realized from the fact that he himself had been confronted with a knife at his throat by, as he put it, "a motorcycle gang," should have known from the fact that one of his own ushers was robbed. That there was something amiss in that area and precaution should have been taken to safeguard the patrons and was not the responsibility of the plaintiff. It was the responsibility of the defendant to offer the security. And certainly one didn't have to wait until something so serious as has happened here, as has happened here, to establish the need for proper security in that ballroom. Now, it does have this

language which I'm sure the defendant would prefer. It says, "furthermore, wherein a ballroom such as this conditions existing at the time of the accident are open and obvious to any person of [107] ordinary intelligence, the defendant is under no duty to warn the plaintiff, even where a substantial crowd has gathered. I don't think that's in point in this case. We're not talking of that kind of a jam-up in this theatre. We're not talking of a situation analogous to having eighteen hundred or nineteen people on such a small area as a dance floor that's only ninety by a hundred and twenty-five feet. And one doesn't need much common sense to know that you're pretty much apt to get bumped in that kind of a crowd under those—such crowded conditions. Now, they did say that under those situations, the bump which floored the plaintiff may have been deliberate, was in our view not such a happening that the defendant was bound to anticipate it. It was unusual and not reasonably to be apprehended and affords no basis for treating the defendant as negligent. And they get rather colorful here and say that the vagaries of fashions in the dance and the consequences are better left subject to the judgment of those who engage in them or frequent establishments where they may be found absent circumstances which may, in the light of the principles herein discussed, provide a basis for the liability.

I must say with all the respect I have for that Supreme Court and its personnel to say that a thing like this could not have been anticipated, is in my humble opinion straining logic to a filament. I can't conceive of jamming eighteen, [108] nineteen hundred people on a floor and feeling that someone wouldn't come along and might intentionally bump you, I don't appreciate that part of the opinion. But that's not the important part. The important part is the law it lays down, which is good sound law as to what the jury has to consider in making the decision. And furthermore, in the last analysis, it's a question of fact for the jury to decide and not a question for me to decide.

Mercurio versus *Burrillville Racing Association*, 95 Rhode Island 417. It seems to support the proposition and contains quoted ianguage that appears to be relevant. And I'll just go to that portion, "Absent anything from which defendants should have known it was unsafe or that the car was being operated negligently by the independent contractor. That was the key." There's the other case of *Capone* versus *Narragansett Racing Association* concerning I think it was, a garage—a doorcase if I recall that was, yes, hit by an overhead door which came down when some person, third person had released the door. Although it had never happened in fifteen years, they found there the defendant knew it might happen and normally had two employees watching the door releases. Now, there is language in Prosser which the defendant can look to for comfort. It says the defendant is not required to protect against unforeseeable facts. But then again, see page 283 in Prosser where it says that if [109] such misconduct is to be anticipated and the risk of it is unreasonable liability—is unreasonable, liability will be imposed. And then there's the case of *Gill* versus *Chicago Park District*, 407 Northeast Second 671. There they said if the plaintiff had shown any prior incidents of violence at the stadium, the court would not have granted summary judgment for the defendant. Which brings me to the case of *Taylor* versus *Harker*, Northeastern Reporter Second Series, 428. Now, that's at page 622, that I'm reading from. Now, there are certain marked portions of this case which the defendant can use for his benefit and certainly can argue from which—from this case, because it raises the issues that he has raised here. We can say up to this point that there's no question of premise of liability, has to be just as was recited in the language I quoted to you from the Massachusetts case of *Gogin* versus *The New State Ballroom*. That liability must arise from its knowledge or the fact that it should have known of or anticipated in the exercise of reasonable care the disorderly or rowdy actions of third persons which might lead to injury to

the plaintiff. Okay. Here in the *Taylor* v. *Harker* case that I'd like to go over with you, there was a negligent action which was brought against shopping mall owners by customers. They were assaulted in the mall's parking lot by some third person. There the court granted some rejudgments in favor of the shopping mall's owners. And here is the part—they affirm the lower court. And here's what the court said, which is the argument that Mr. Asquith has made to me, "that shopping mall owners knowledge that shop lifting and thefts have occurred in and on the premises was not sufficient to give rise to a duty on their part to protect customers from assault by third persons." Some of the language which goes to the testimony, there was testimony there that the only criminal activities the defendant was aware of occurred on the mall—that occurred on the mall was shoplifting incidents. He also recalled an occasion which the manager of one of the stores there contiguous to but not part of the mall, was struck by an irate customer at this other store. And there the bill of particulars which was filed showed that the defendants were put on notice that the likelihood of criminal activities by virtue of their awareness of the incident involving what I just told you, the assault and battery, and other instances where a Mrs. Pauline Bettala may have been abducted from the parking lot and which was prior to the opening of the mall. And there was also an affidavit there stating that he intended to introduce evidence of the police department reports of crime—of the police department. Reports of crime which occurred at the mall between March and September. And that that exhibit indicated that they had numerous shoplifting instances, 19 [111] thefts from automobiles, four automobile thefts and one bicycle theft. And the court said not enough for notice. The court said, Although we are aware of no Illinois case that is considered a precise issue presented by the case presented at bar, the court in Mayer, they cite cases, its *Mayer* v. *Riverview Parking Company*, 1st District. So forth and so on, states that the

prerequisite of a good complaint in similar cases is that it must allege not only danger of assault, but that the defendant had notice of such danger and reasonably should have anticipated it. Other jurisdictions have had occasion to consider factual circumstances similar to the case at bar. It has been held that general allegations that various other crimes have been committed on the shopping centers' premises are not sufficient to allow the case to go to the jury. At least one jurisdiction, however, suggested that awareness of theft occurring on the premises gives rise to a jury question on the duty to protect customers from attacks by third persons. That's a Federal case out of the Eastern District of Pennsylvania. That was 428 F Supp. 526, *Morgan* versus *Bucks Associates*, it came out in 1977. Now, they also cite another case here in support of their proposition. They say a case closely resembling the situation present here is *Shipes* vs. *Pigley-Wigley St. Andrews, Incorporated*. There the defendant's motion for a directed verdict was granted in a suit filed [112] by a plaintiff who was injured by attack by third persons in a supermarket parking lot. The court held that where no violent crimes were shown to have been committed in the area of the store and the manager of the store was aware of only shoplifting and theft being committed on the premises, the store owner was not under a duty to protect its customers against criminal attacks because the store owner did not know or have reason to know of such criminal attacks. We find the reason in *Shippes* persuasive and conclude that the rule announced therein should apply in the instant case. Although police reports indicate that there were occurrences of shoplifting and theft in and on the premises, we reject plaintiff's argument that knowledge of crimes against property commonplace in all shopping centers is sufficient to give rise to a duty to protect customers from assault by third persons. To hold otherwise will place liability in shopping centers regardless of the foreseeability.

Now, they say here, in light of these relevant concerns we conclude that defendants in the case at bar did not owe a duty to the plaintiffs to take security precautions against or warn of violent attacks of third persons in a shopping center parking lot. Our holding in this regard does not suggest that shopping center owners or operators may never be charged with a duty to protect customers. And we would here note that where there are factual allegations indicating [113] an awareness on the part of the owners or operators of a history of assault in the parking facilities provided to business invitees or where the facts suggest notice that the area is frequented by undesirable characters, liability may arise and summary judgment would be inappropriate. And that's exactly what I think is the situation in the case at bar. What could be more dramatic than to have a man in the lobby of this theatre be assaulted by a person who, as he termed, was a member of a motorcycle gang and obviously threatened to cut his throat. Says, "don't hassle me". What could be more dramatic than to have a very usher of your cadre of ushers robbed in the very theatre he's supposed to be taking care of? What could be more significant than in this theatre a group of boys who are rowdy, noisy, as some witness put it, obnoxious and no one there even to begin to try to calm the potential of danger that that posed. And I daresay, and I don't want to be accused of narrow-mindedness, but from the way one of the witnesses described the appearance of these people, they must have been a wild looking group of individuals.

Now, Mr. Asquith argues that all the witness, that is all the plaintiff's brothers—plaintiff brother and his friends, said they spoke only once to the noisy group and that this is inconceivable. He also argued that other patrons moved to other places of the theatre. Well, I don't [114] see the relevance of that, that someone saw fit to get up and move to some other area of the theatre. It has any relevance to this. I don't see where there's any relevance that there was a group in

back that did not get involved in this altercation with this same group. I don't see any relevance that they stared at each other or that one made a motion to the other. The fact is, the issue is was there sufficient notice on the part of this store owner—of this theatre owner to have him realize that he was operating an establishment that was a potential of trouble. And I fail to see how anyone can argue to the contrary in light of his own personal experiences, in light of the experiences of this usher, in light of the situation that existed there that night. And though the Illinois case seemed to indicate that property violations weren't sufficient to put an owner on notice, I think the language that I read to you from the very end of the case is very significant indeed and appropriate to this case which I then pointed out where they say, "We would note here that where there are factual allegations indicating an awareness of the part of the owners and operators of a history of assaults in the parking facilities provided to business invitees, or where the facts suggest notice, that the area is frequented by undesirable characters." I think it fits.

I deny your motion for direction and grant you an exception.

* *

[65] THE COURT: I said I only let that in because the jury could get the picture in its entirety. When you're having auto thefts and vandalism to such an extent, that you must policemen on top of buildings to watch it, and you know that you've been assaulted by a knife from a motorcycle gang, and you know that one of your own ushers has been robbed, then I say putting all those things together, satisfies the requirement of admissibility. I give you an exception.

MR. ASQUITH: I accept that.

THE COURT: Now let's take five minutes and see if your witness has come in.

MR. ASQUITH: My witnesses are here. May I have about two minutes to talk to them?

THE COURT: You may. In fact, I would appreciate it if you'd take four so I can have a cigarette.

(Recess)

MR. ASQUITH: Your Honor please, that witness' testimony would merely have been cumulative as to what he already testified to. I had talked to him and I misunderstood what he told me on the phone, so I rest for the defendant, but I would like to renew my motion for a directed verdict.

THE COURT: Okay, and I will deny the same for the reasons I've already stated.

MR. ASQUITH: Could I put a couple of reasons on the record?

THE COURT: Are they going to be a reiteration, something new?

* * *

[67] unrebutted, and that stands, then whatever the total damages they state, that's the total damages of the case, so we don't have to come back on a new trial. Yes, now your directed verdict, Mr. Asquith.

MR. ASQUITH: Your Honor please, at this time, defendant renews its motion for a directed verdict in view of the additional testimony and evidence adduced from Mr. Bilsborough, which establishes the fact that certain security measures have been in effect all along in this theater, and security measures were in effect on the day in question, when this occurred. It also establishes that over 3 million patrons have attended that theater since 1975, without any violent crime, except that which was experienced by Mr. Bilsborough himself, on a prior occasion in 1977, which was most remote from this day. The other instances which are in the record, would be unarmed robbery, and an abduction in the parking lot of the theater. There is no evidence that that was done by a patron of the theater. There is no evidence that the theater had anything to do with that instance. All the other crimes that are listed are crimes such as vandalism, auto theft, larceny, attempted auto

theft, those crimes involve property, not lives. The evidence adduced from Mr. Bilsborough establishes beyond any doubt there were no assaults or any incidents at any of the exits to theater complex for the period '75 to the date of this accident. The Court in denying [68] my original motion cited two cases, Shippes v Piggly Wiggly, St. Andrews Inc., and Taylor v Harker.

THE COURT: Those are the cases I went over the other day—I guess it was yesterday.

MR. ASQUITH: Yes, your Honor. I have photocopies, and I read those last night. It's extremely important, as I read those cases, for the plaintiff to establish an historical concept of violent crime, or crime of a nature which was commited on December 25, '79 at Showcase Cinema, prior to that time. In fact, one of these cases specifically says auto theft is not such a crime to give notice of any violent crime. There is no evidence in this record, your Honor, of any confrontations on a parking lot by the patrons, and the alleged perpetrators of crimes of auto thefts, auto vandalism, or anything of that nature, absolutely none. It seems that what this plaintiff is saying that in order for a theater to conduct business, having these isolated instances, and having had such a model record, that they operate at their peril, that they have to be responsible for irresponsible individuals, that they have no dress code. There is no requirement for any theater to have a dress code. As a matter of fact, this Court knows that if any theater imposed a dress code it would be considered unconstitutional. The theater cannot determine by those who enter the theater what their—is in their mind. It's impossible. It's impossible [69] to tell what's in the mind of a patron when he goes into that theater.

THE COURT: Okay. I know your position.

MR. ASQUITH: That's what I wanted to put on the record, your Honor.

THE COURT: Thank you, Mr. Asquith. Would you like to put something on the record, Mr. LaFazia?

MR. LAFAZIA: Just briefly, your Honor, that since your Honor last ruled on that, your Honor, I think we have even more evidence by which it can go to the jury, that Mr. Bilsborough wasn't there during all of that period of time, that they don't keep records of the crimes there at all. We have additional evidence that the showing of the Warriors, there was police security there. There was a reason for that. I think that in accordance with the rule of the restatement, there is adequate evidence in this record for the jury to consider whether or not the security measures there that night were adequate. No usher appeared here to state that he was in the theater and that during that performance what these witnesses testified to just wasn't true. I think that testimony stands uncontradicted.

THE COURT: My ruling is I've made it, it stands. The motion is denied. Exceptions placed on the record. . . .

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 81-0446 P

JOHN SILVA and URSULA SILVA, Administrators of the Estate of JOHN SILVA, JR.

v.

SHOWCASE CINEMAS CONCESSIONS OF DEDHAM, INC.; NATIONAL AMUSEMENTS, INC.

C.A. No. 82-808B

JOHN SILVA and URSULA SILVA, Administrators of the Estate of JOHN SILVA, JR.

v.

NATIONAL AMUSEMENTS, INC., et al.

Oral Argument Requested

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND, IN THE ALTERNATIVE, FOR A NEW TRIAL

The defendant, National Amusements, inc., moves this Court pursuant to Rule 50 and Rule 59 of the Federal Rules Of Civil Procedure to set aside the verdict in favor of the plaintiff entered in this cause on November 10, 1983 and to enter judgment for the defendant in accordance with the defendant's motion for a directed verdict. Defendant's motion for a directed verdict should have been granted because:

1. The evidence is insufficient to warrant a finding of liability as to the defendant.
2. There is no evidence in the record to warrant a finding

DENIED:

(s) RAYMOND J. PETTINE, *Senior Judge*
December 7, 1983

APPENDIX C

Constitutional Provisions and Rules of Civil Procedure Involved

Constitution: First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution: Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Civil Procedure

Rule 50. MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

(a) *Motion For Directed Verdict: When Made Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties

to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) *Motion For Judgment Notwithstanding The Verdict.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) *Same: Conditional Rulings on Grant of Motion.*

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the

motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) *Same: Denial of Motion.* If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Rule 59. NEW TRIALS; AMENDMENT OF JUDGMENTS.

(a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and

(2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in

an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) *Time For Motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) *Time For Serving Affidavits.* When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) *On Initiative Of Court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) *Motion To Alter Or Amend A Judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 83-1924

JOHN SILVA, ET AL.,
PLAINTIFFS, APPELLEES,

v.

SHOWCASE CINEMAS CONCESSIONS
OF DEDHAM, INC., ET AL.,
DEFENDANTS, APPELLANTS.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

PETITION FOR REHEARING PURSUANT TO RULE 40 ON BEHALF OF DEFENDANTS, APPELLANTS

In the instant case this Court affirmed the judgment of the District Court and entered judgment on June 14, 1984.

Counsel for Defendants, Appellants are fully cognizant of the unusual nature of this Petition since in their legal experience it is the first time they have filed such a Petition. Counsel takes this action out of a duty imposed on counsel by their profession and out of a duty imposed on counsel as officers of this Court. This Petition is submitted with all respect to this Court and is an attempt to present a legal analysis based on the law applicable to the facts in this case. The Petition is submitted to persuade this Court to rehear this case because counsel feels that significant and important judicial precedent

has been established by this Court. It is respectfully submitted that the opinion of this Court in the instant case imposes liability without fault not only on the owner of this theater but upon the owner of any premises including a homeowner.

In the case of *Carlson* v. *American Safety Equipment Corp.*, 528 F.2d 384 (1st Cir. 1976) this Court held at page 385:

> "We examine the facts in the light most favorable to plaintiff, but without neglecting the uncontradicted evidence introduced by the defendant."

And, in the same case this Court held at page 286:

> "A plaintiff is not entitled to unreasonable inferences which rest on speculation and conjecture."

In the case of *Allen Pen Co.* v. *Springfield Photo Mount Co.*, 653 F.2d 17 (1st Cir. 1981) this Court held at page 19:

> "On appeal, we view the evidence in a light most favorable to the appellant, giving it the benefit of all reasonable inferences without neglecting uncontradicted evidence introduced by appellee."

It is submitted that the court misapprehended its duty on the appeal in this case since it did neglect the uncontradicted evidence of the theater and overlooked the testimony of the witness Bilsborough. When the motion for direction was made at the close of the defense in this case the uncontradicted testimony was that there were 10 to 12 ushers on duty December 25, 1979 and while he could not specifically name the ushers he *saw* ushers patrolling the theater where Quadrophenia was being displayed at the time in question, and that he personally had entered the theater on two occasions and had not observed or heard anything unusual. (App. 263, 264, 265, 266 and 267). It is submitted that the most favorable inference that a jury could draw was that witnesses

for the plaintiffs did not observe the ushers who were obviously in the theater at some time during the movie. In addition, since the noise was intermittent it is a fair inference to draw from the uncontradicted testimony that the ushers did not hear or observe anything unusual when they patrolled the theater because there was no noise at the time the ushers were in the theater. It is not a fair inference to draw that no usher *"even appeared inside the theater auditorium."* This court in overlooking the uncontradicted testimony of Bilsborough imposed the duty of an insurer on the theater.

The uncontradicted testimony of Bilsborough was that the movie Quadrophenia had been displayed at the theater for 5 days prior to December 25, 1979 without incident. (App. 284). Mr. Bilsborough testified that from the opening of the theater complex in 1975 through the end of 1979, there had been 3,411,655 patrons at the theater complex. (App. 274). Mr. Bilsborough testified that from the time the theater opened in 1975 until December 25, 1979 there had been no assaults nor crimes inflicted on any theater patrons at any of the exits in the theater complex. (App. 261, 262). Mr. Bilsborough also testified that there was a police officer stationed inside the theater complex on only *one* occasion from 1975 until Christmas 1979 and this was done because the film distributor of the film, Warriors, contacted the theater and offered to share the cost of providing security. (App. 271). This uncontradicted testimony clearly depicts a past experience of reasonable action by the theater once the theater had actual notice. The incident with the motorcycle gang in the theater lobby was reasonably handled by Mr. Bilsborough once he had actual notice. (App. 159, 161). The Court in neglecting the uncontradicted testimony of Bilsborough misapprehended the application of the *Rawson* case and Restatement (Second) of Torts §344 and comment f. (1965).

It is respectfully submitted that both Rawson and the Restatement of Torts require *actual* notice to the possessor of premises before liability will be assessed against the possessor.

In *Rawson* the theater had actual notice prior to the assault. This was argued to the trial court. (App. 89). The Restatement of Torts enunciates a doctrine that a possessor is not an insurer and is under no duty to exercise any care until the possessor knows or has reason to know from past experience or from the environment of the premises that there is a likelihood of danger to visitors on the premises.

The uncontradicted testimony of Bilsborough having been neglected in this litigation has resulted in a substantial miscarriage of justice and the assessment of liability against a very responsible and unsuspecting defendant. The record in this case is clear that the defendant never had any notice which would have required it to do anything beyond what was done according to the uncontradicted testimony of Bilsborough.

The legal analysis of the other facts found favorably to the plaintiff were misapprehended by this Court. No favorable inference should be drawn from the fact of showing the film Quadrophenia since there is absolutely no evidence that the film inspired any emotion of violence in any of the participants. The exchange between the two groups related only to keeping quiet. The content of the film could not properly have been a fact upon which the jury in this case could draw any inference. The words and profanity between the two groups during the movie in the record do not in any conceivable manner support any inference that violence was about to occur in the theater during the movie. No violence in fact did occur. It is pure speculation on the part of the jury to draw an inference based on the facts which occurred within the theater and the eventual stabbing at the exit door. It is clear from the record that the two groups were sufficiently separated by the aisle during the movie so no physical harm could have been inflicted on anyone. In the *Rawson* case this fact did not exist. There is absolutely no evidence of any gestures during the showing of the movie by any person in either group. Therefore any inference drawn by the jury on this non-existent fact is completely unfounded.

The defendants respectfully assert predicated upon the evidence adduced at trial that there was no evidence of actual notice to them. It is again pointed out by defendants that both *Rawson* and the Restatement of Torts rely on actual notice to the defendants before assessing liability. The Illustrations in the Restatement Of Torts §344 Comment (f) both deal with situations where the possessor of land has actual notice. The Restatement Of Torts emphasizes that the possessor of land is not an insurer. Neither *Rawson* nor the Restatement Of Torts enunciates a doctrine of liability without fault. There is no way in this record that the defendants could be charged with foreseeability of the stabbing when the defendants on the record had no notice as required by *Rawson* and the Restatement Of Torts.

It is also submitted that this Court overlooked the suddenness of the stabbing as portrayed by every witness in the case. Even if there had been an usher at the exit door, the usher could not have prevented the stabbing. Only through speculation could the jury attribute any fault to the defendants by reason of their failure to have an usher at the exit. The uncontradicted evidence does establish that ushers were patrolling the theater auditorium during the movie in a reasonable manner. The track record of the theater on physical harm to its patrons is impeccable in the record of this case.

The Court, in its opinion, purported to follow the logic of the *Rawson* court (*Rawson* v. *Massachusetts Operating Co.*, 328 Mass. 558, 105 N.E.2d 220 (1952)). However, analysis shows that the opinion goes beyond the *Rawson* rationale to the point of accepting an inference based upon possibilities or speculation. Figure 1., following, presents a graphic comparison of the analysis followed by the *Rawson* Court and this Court. The ultimate issue in both instances being whether the assault was foreseeable. At levels I, II and III the same facts could be found. At level IV an inference must be made. For purposes of analysis, it is assumed that the inference made by the Court in *Rawson*, and here, is more reasonable, based upon the record. At level V, there are, again, similar facts. At level VI, the Court must again choose between competing inferences.

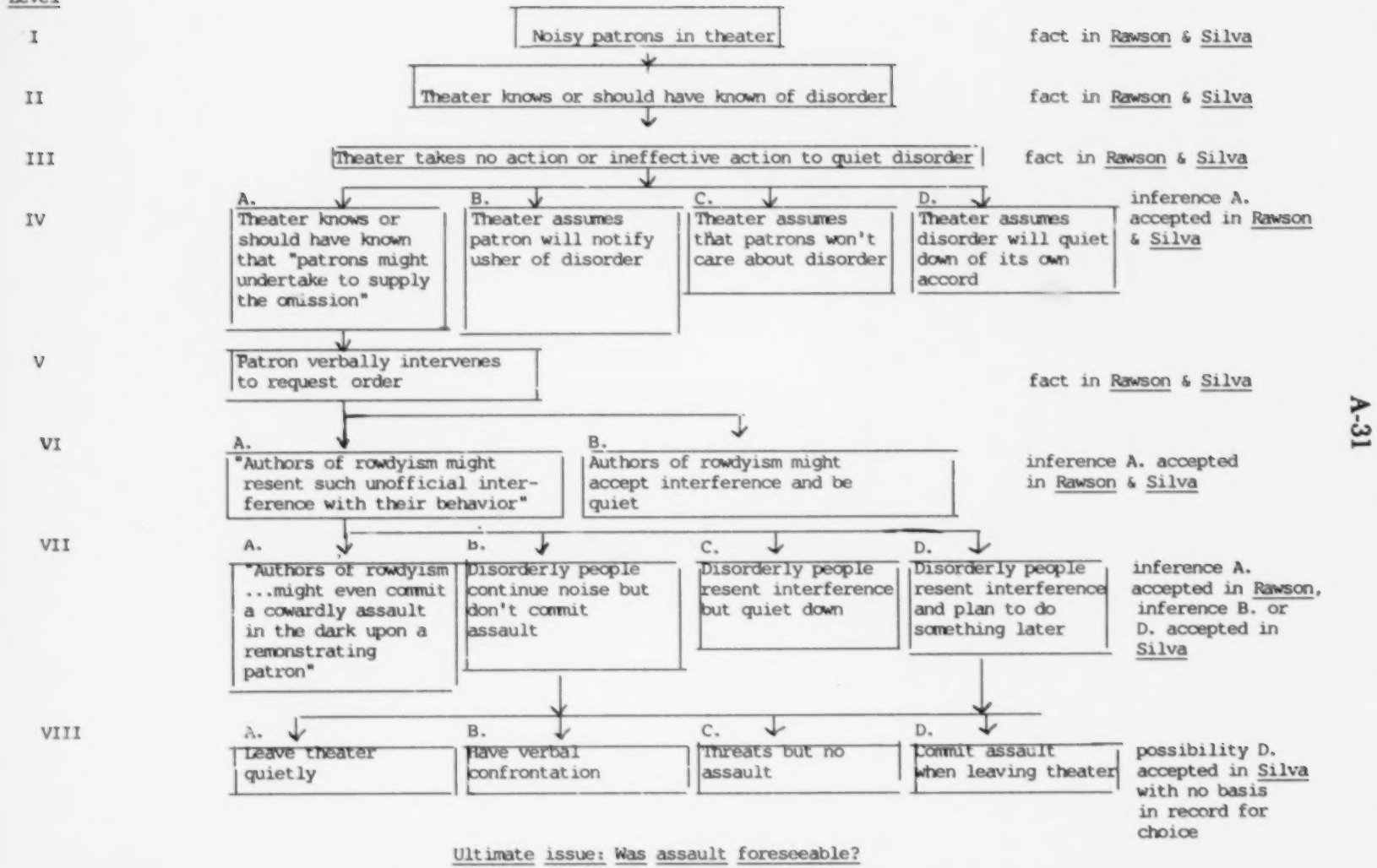
By the time level VII is reached, the facts of the cases diverge. In *Rawson*, the disorderly patron immediately responded to the intervention by assaulting the plaintiff. 328 Mass. at 559, 105 N.E.2d at 221. Further, in *Rawson*, the assault occurred when plaintiff intervened in a "terrific" struggle. *Id.* Obviously, the inference drawn by the *Rawson* Court, at this level, may be considered reasonable based upon the facts of that case. Also, of great importance, this inference is the final inference necessary to be drawn by the court to reach the ultimate issue. In the present case, at this level, the Court must accept a different inference, which, based upon the facts is more reasonable than the inference accepted in *Rawson*.

This court in the instant case cannot, as did the *Rawson* Court, stop at level VII. It went on to a further inference which had absolutely no support in the record. The testimony of the decedent's brother and friends detailed in appellant's brief make it clear that there was no expectation or anticipation of an assault. This Court concluded:

> The jury could have reasoned that the show of authority itself would have cowed the troublemaking group; or it might have believed that an usher keeping an eye on the group as it left, ready to call for help to the policeman in front of the theater, would have made the difference.

The logical problem with this conclusion is that it assumes, without discussion or support in the record, that appellant had some reason to make any show of authority or post an usher at the exit after the movie was over and all of the patrons were making an orderly exit without any physical jostling, verbal confrontation or show of a weapon. The factfinder would be required to reach its ultimate conclusion based upon speculation and conjecture. Plaintiff is not entitled to such a benefit. *Carlson* v. *American Safety Equipment Corp.*, *supra*, 528 F.2d at 386.

FIGURE 1


Level
I
Noisy patrons in theater
fact in Rawson & Silva
II
Theater knows or should have known of disorder
fact in Rawson & Silva
III
Theater takes no action or ineffective action to quiet disorder
fact in Rawson & Silva
IV
A. Theater knows or should have known that "patrons might undertake to supply the omission"
B. Theater assumes patron will notify usher of disorder
C. Theater assumes that patrons won't care about disorder
D. Theater assumes disorder will quiet down of its own accord
inference A. accepted in Rawson & Silva
V
Patron verbally intervenes to request order
fact in Rawson & Silva
VI
A. "Authors of rowdyism might resent such unofficial interference with their behavior"
B. Authors of rowdyism might accept interference and be quiet
inference A. accepted in Rawson & Silva
VII
A. "Authors of rowdyism ...might even commit a cowardly assault in the dark upon a remonstrating patron"
B. Disorderly people continue noise but don't commit assault
C. Disorderly people resent interference but quiet down
D. Disorderly people resent interference and plan to do something later
inference A. accepted in Rawson, inference B. or D. accepted in Silva
VIII
A. Leave theater quietly
B. Have verbal confrontation
C. Threats but no assault
D. Commit assault when leaving theater
possibility D. accepted in Silva with no basis in record for choice

Ultimate issue: Was assault foreseeable?

CONCLUSION

For the foregoing reasons it is respectfully requested that a rehearing be granted pursuant to Rule 40.

Respectfully submitted,

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